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Working Group on Arbitrary Detention

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No. 39/2014 (Tunisia)

Communication addressed to the Government on 15 September 2014

concerning Salem Lani, Abdedelwaheb Thabti, Mabrouk Gasser, Elfakhem Elwichi, Bechir H'rabi, Monji Maiz, Ibrahim Thabti and Saïd Chibli

The Government has not replied to the communication.

The State is a party to the International Covenant on Civil and Political Rights, to which it acceded on 18 March 1969. The State is also a party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, to which it acceded on 23 September 1988.

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the former Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. The Human Rights Council assumed the mandate in its decision 2006/102 and extended it for a three-year period in its resolution 15/18 of 30 September 2010. The mandate was extended for a further three years in resolution 24/7 of 26 September 2013. In accordance with its methods of work (A/HRC/16/47, annex), the Working Group transmitted the above-mentioned communication to the Government.

2. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to the detainee) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (category II);

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(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law for reasons of discrimination based on birth; national, ethnic or social origin; language; religion; economic condition; political or other opinion; gender; sexual orientation; or disability or other status, and which aims towards or can result in ignoring the equality of human rights (category V).

Submissions

Communication from the source

3. This is the case, as submitted to the Working Group on Arbitrary Detention.

4. According to the information received, eight Tunisian nationals belonging to the Ennahdha party or to the local revolution protection committee were arrested by the Tunisian authorities, and most of them have reportedly been held in Harboub prison since November 2012. The persons in question are:

- Salem Lani, born on 14 June 1985;
- Abdedelwaheb (or Abdelwahab) Thabti, born on 1 August 1980;
- Mabrouk Gasser (or Elkassir, Elkasser or Elkaser), born on 21 February 1971;
- Elfakhem (or Elfakhim) Elwichi, born on 19 January 1967;
- Bechir H'rabi (or Harabi or Elharabi), born on 15 September 1968;
- Monji (or Mongi) Maiz, born on 20 March 1986;
- Ibrahim Thabti (or Thebti), born on 12 March 1986;
- Saïd Chibli, born on 3 August 1962.

5. According to the information received, a peaceful demonstration organized by the local revolution protection committee and authorized by the public authorities was held on 18 October 2012 in the governorate of Tataouine to protest against the retention of allegedly corrupt persons in the regional administration and in local government after the Tunisian revolution of 14 January 2011.

6. The source reports that the demonstration began in front of the *Maison du peuple* (House of the people) with a speech by Saïd Chibli in which he explained the purpose of the demonstration and underlined its peaceful nature. The demonstrators then headed in a calm and orderly fashion towards certain locations viewed as strategic. It was not until around 11 a.m., when they reached the headquarters of the General Agriculture and Fisheries Union, that events took a different turn.

7. The source claims that persons inside the building, particularly Lofti Naguedh, Salah Bouchnak and Ahmed Alhamdi, started to attack the demonstrators with stones and Molotov cocktails, severely burning several of them. After the riot police fired into the air to disperse those present, a general panic broke out and the persons inside the Union headquarters building left it.

8. According to the information received, one of these persons, Mr. Naguedh, then suffered a heart attack. Mr. Chibli reportedly tried to protect Mr. Naguedh, who was taken to hospital and resuscitated by an emergency doctor using oxygen. His state of health improved before deteriorating again 15 minutes later. Five doctors and nurses performed cardiac massage for 35 minutes and used adrenaline injection, electric shock and chest compressions, which account for the fractures observed in that part of the body. Despite their efforts, Mr. Naguedh died in hospital as a result of the heart attack. These facts were noted, and the death from a heart attack confirmed, in a medical report produced by the Tataouine emergency medical and resuscitation teams.

9. The source reports that, although the deceased's medical file disappeared from the hospital, corroborating accounts show that Mr. Naguedh had suffered two previous heart attacks, in 2005 and 2006 (he was hospitalized from 4 March 2005 to 9 March 2006: file Nos. 1744/2005 and 61/2005) and that the medical diagnosis had been heart failure.

10. The source indicates that, on 21 October 2012, members of the Tataouine General Union of the National Guard and Union of Rapid Response Group Officers issued a press release confirming that the demonstration had been peaceful and that they had verified that the demonstrators were unarmed. They also bore witness to the events and the fact that some members of the General Agriculture and Fisheries Union had thrown boiling water, Molotov cocktails and stones at the demonstrators from the balcony of the Union headquarters, leading some of the demonstrators to throw stones back and attempt to enter the building.

11. Eight persons involved in the demonstration were charged with murder and arrested, despite the defence testimony given by Jilani Dabbabi, a cousin of the deceased, and the medical certificates and reports, attesting to death from a heart attack, that had been produced by five different doctors and confirmed by a forensic pathologist. Nevertheless, the investigating judge sought a second opinion from Dr. Samir Maatoug, who asserted, on the basis of police and investigation reports and without examining the body of the deceased, that the death had resulted from acts of violence and not from a heart attack.

12. According to the information received, on 4 November 2012 the Gorjani unit of the criminal police arrested Ibrahim Thebti, Mongi Maiz, Bechir Harabi, Elwichi Elfakhim and Mabrouk Elkaser, without a warrant, in Tataouine, and transferred them to Harboub prison pending their initial interrogation. On 6 November 2012, Saïd Chibli was also arrested after being summoned to Gorjani police station in Tunis and given a hearing at the court of first instance in Tataouine, all of which occurred prior to the hearing of the persons arrested earlier, on 4 November 2012. Although the investigating judge allegedly ordered their detention on 9 November 2012, it was not until 16 November 2012 that they were all heard by the Tataouine court of first instance. After that interrogation, Mr. Thebti and Mr. Elfakhim were released and then arrested once more following an appeal by the public prosecutor's office against this decision.

13. Abdelwahab Thabti was arrested on 15 December 2012 in Tataouine, given a hearing on 17 December 2012 and transferred to Harboub prison. Salem Lani was arrested on 16 January 2013 and had a hearing the following day at the Tataouine court of first instance before he, too, was transferred to Harboub prison.

14. The source asserts that these persons were held in a secret location throughout their detention. Their lawyers were informed that they had been examined by a doctor and were in good health. According to the source, however, the officers who conducted their hearings threatened them with life imprisonment, insulted and bewildered them by asking multiple questions at the same time and made improper gestures, even touching them. Moreover, the investigating judge reportedly refused to allow their lawyers to be present or to summon witnesses for the defence.

15. According to the information received, on 29 March 2013, the preliminary investigation was closed and Abdelwahab Thabti and Salem Lani were charged with premeditated murder, while the other six defendants were charged as accessories to murder. On 3 April 2013, appeals were lodged by the public prosecutor's office and the defence lawyers.

16. On 23 April 2013, the given bias shown by the judges against the defendants before they had even been tried, the defence lawyers moved for the court to relinquish jurisdiction and refer the case to another court.

17. On 15 July 2013, the indictments chamber of the court of second instance at Sousse rejected the various appeals and charged the defendants with involvement in a fight leading to a fatal heart attack.

18. According to the information received, on 12 August 2013, the Tunisian judiciary ordered the detainees' transfer to the Sahel region of Tunisia. They were split into three groups: Mr. Chibli, Mr. Maiz and Mr. Elharabi were transferred to Messadine prison in the governorate of Sousse; Mr. Thabti, Mr. Thebti and Mr. Elfakhim were transferred to Mahdia prison in the governorate of Mahdia; and Mr. Lani and Mr. Elkassir were transferred to Monastir prison in the governorate of Monastir.

19. On 24 September 2013, before the Tunis court of cassation, the chief prosecutor of the Sousse court of second instance appealed the decision of 15 July 2013. The source states that on 3 January 2014 in the face of pressure, the indictments chamber of Sousse court of second instance withdrew the charge of manslaughter and requested that the eight defendants should be sentenced for premeditated murder, as well as for their involvement in a fight leading to a fatal heart attack.

20. The source reports that, on 23 January 2013, the indictments chamber of the Sousse court of second instance decided to reinstate the charge of manslaughter and the detention order on the basis of the same facts, meaning that the defendants were held for longer than the maximum permissible period of pretrial detention.

21. On 25 March 2014, Ms. Lamia Khmiri brought a complaint against the members of the indictments chamber of Sousse court of second instance for violating the legal provisions governing pretrial detention, thereby rendering the detentions arbitrary. It is reported that the case, No. 36081, is currently pending before the Tunis court of cassation, which has pushed back the dates of its deliberations continuously.

22. Article 29 of the Tunisian Constitution of 2014 and articles 84 and 85 of the Code of Criminal Procedure set forth domestic guarantees with regard to detention. The last two articles provide, inter alia, that the period of pretrial detention for serious crimes may not exceed 14 months. In the present case, however, the period has been exceeded, as the persons have been detained since 4 November 2012 (Ibrahim Thebti, Mongi Maiz, Bechir Harabi, Elwichi Elfakhim and Mabrouk Elkaser); 6 November 2012 (Saïd Chibli); 15 December 2012 (Abdelwahab Thabti); and 16 January 2013 (Salem Lani).

23. According to the source, the judicial decision of January 2014 to bring new charges against the petitioners so as to justify a new period of pretrial detention is a clear violation of domestic provisions. The detention has no legal basis, rendering it arbitrary under category I of the criteria applicable to cases submitted to the Working Group, in violation of article 9, paragraph 1, of the International Covenant on Civil and Political Rights.

24. The source maintains that the deprivation of liberty of these eight persons is also arbitrary under category III of the criteria applicable to cases submitted to the Working Group, as these persons were not afforded fair trial guarantees. Moreover, according to the source, the principles of the presumption of innocence and impartiality were not respected, since the judges expressed their hostility towards these persons publicly, in violation of

articles 10 and 11 of the Universal Declaration of Human Rights and article 14, paragraphs 1 and 2, of the International Covenant on Civil and Political Rights. Proof of this lies in the words of the chief prosecutor of Médenine, who branded the detainees "criminals" before the preliminary investigation had even begun, prompting the defence to request, in vain, that the case should be referred to another authority on the grounds of bias by the first court. It is reported that no action was taken in response to the complaints lodged against members of the judiciary.

25. The source reports that the judicial authorities paid attention only to the prosecution witnesses, disregarding the defence witnesses and marginalizing evidence such as medical certificates, photos and videos, in violation of article 14, paragraph 3 (e), of the International Covenant on Civil and Political Rights. In addition, according to the source, the lack of a committal order, in violation of article 9, paragraph 1, of the International Covenant on Civil and Political Rights; the obstruction of access to a defence (particularly owing to the use of secret detention), which violates article 11 of the Universal Declaration of Human Rights and article 14, paragraph 3 (b), of the International Covenant on Civil and Political Rights; the methods of interrogation, which violate article 14, paragraph 3 (g); and the failure to specify individual charges are also proof of the lack of a fair trial.

26. It follows from the information received that this detention may be arbitrary under category V because of discrimination based on the fact that these persons were affiliated with the illegal political movement Ennahdha.

Response from the Government

27. In a letter dated 15 September 2014, the Working Group transmitted the above allegations to the Government of Tunisia and requested detailed information on the current situation of the eight individuals in question and clarification of the legal basis justifying their detention.

28. The Working Group finds it regrettable that, to date, the Government has neither replied to the allegations that have been sent nor requested an extension of the time limit for doing so in accordance with paragraphs 15 and 16 of the Working Group's methods of work.

29. Despite the Government's failure to reply, the Working Group considers that it is in a position to render an opinion on the detention of the eight individuals in question, in conformity with paragraph 16 of its methods of work and on the sole basis of the information provided by the source.

Discussion

30. Upon receipt of the information submitted by the source, the Working Group noted several contradictions in the spelling of names, the dates of arrest and the number of persons concerned. The secretariat of the Working Group therefore sought clarification from the source on 27 June 2014, but to no avail. Nevertheless, these contradictions do not affect the substance of the allegations, given that the situation is well known and that the source has submitted numerous consistent pieces of evidence related to the prosecution and continued detention of the eight persons mentioned by name in the petition. In short, the prima facie credibility of the claims has been established.

31. With regard to category I of the arbitrary detention categories, the Working Group considers that reclassifying the offences does not allow the public authorities to impose a new period of pretrial detention without taking into account the time already spent in custody. Consequently, the Working Group concludes that the continuation of the

individuals' detention beyond January 2014 (up to the start of the trial) lacks a legal basis and is therefore arbitrary.

32. Moreover, the Working Group is deeply concerned at the repeated violations of basic elements of the right to a fair trial, including the rights of the defence, the integrity of the proceedings and the impartiality of the court, as established in article 10 of the Universal Declaration of Human Rights and article 14, paragraph 1, of the International Covenant on Civil and Political Rights. The reported facts, which have not been denied by the Tunisian Government, reveal serious breaches in the administration of justice, at least with regard to these eight persons. The Working Group therefore concludes that the detention is arbitrary under category III. The case should be referred to the Special Rapporteur on the independence of judges and lawyers for a more detailed assessment and the necessary follow-up to ensure that the rule of law is a reality in Tunisia at all times.

33. Lastly, the facts not contested by the Tunisian Government demonstrate that these eight persons are being prosecuted for exercising their rights to freedom of opinion, expression and demonstration, as recognized in article 19 of Universal Declaration of Human Rights, article 19 of the International Covenant on Civil and Political Rights and the relevant legal framework, given that the street demonstration had been duly authorized. There is every indication that their membership of the Ennahdha party is at the very root of the proceedings against them, with everything being done to incriminate them in an accidental death in circumstances that would not otherwise allow such culpability to be established. The Working Group therefore concludes that the detention is also arbitrary under category V.

34. The Working Group is also concerned about the treatment of these persons at the very outset of their detention. A thorough investigation is required into the allegation of ill-treatment, and the Working Group refers the case to the Special Rapporteur on the question of torture.

Disposition

35. In the light of the foregoing, the Working Group renders the following opinion:

> The continued deprivation of liberty of Salem Lani, Abdedelwaheb Thabti, Mabrouk Gasser, Elfakhem Elwichi, Bechir H'rabi, Monji Maiz, Ibrahim Thabti and Saïd Chibli as from January 2014 is arbitrary, in that it lacks a legal basis in violation of article 9 of the Universal Declaration of Human Rights and article 9 of the International Covenant on Civil and Political Rights. The detention is also arbitrary as the right of these eight persons to a fair trial has not been respected and their prosecution results from the exercise of their fundamental freedoms, in violation of articles 10 and 19 of the Universal Declaration of Human Rights and articles 14 and 19 of the International Covenant on Civil and Political Rights. The detention thus falls under categories I, III and V of the criteria applicable to the consideration of cases submitted to the Working Group.

36. The Working Group therefore requests the Government of Tunisia to release Salem Lani, Abdedelwaheb Thabti, Mabrouk Gasser, Elfakhem Elwichi, Bechir H'rabi, Monji Maiz, Ibrahim Thabti and Saïd Chibli without delay and to take the necessary steps to remedy the material and moral injury that they have suffered, including by providing reasonable and appropriate compensation in accordance with article 9, paragraph 5, of the International Covenant on Civil and Political Rights.

37. The Working Group recalls that the Human Rights Council has requested all States to cooperate with the Working Group, take account of its views and take appropriate steps

to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.[1] The Working Group therefore requests the full cooperation of Tunisia in implementing this opinion in order to provide effective redress for a violation of international law.

38. The Working Group refers the allegations of ill-treatment that have been made and not contested in this case to the Special Rapporteur on the question of torture for appropriate action.

39. The Working Group also refers the allegations of judicial bias against the defendants because of their political affiliation to the Special Rapporteur on the independence of judges and lawyers for appropriate action.

[*Adopted on 18 November 2014*]

[1] Human Rights Council resolution 24/7, paras. 3, 6 and 9.